ANIMAL PROTECTION INSTITUTE OF AMERICA

IBLA 94-56 Decided January 13, 1994

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., affirming a decision by the Shoshone-Eureka Resource Area Manager, Bureau of Land Management, to make a proportionate reduction of wild horses and livestock. N6-92-2.

Affirmed.

1. Wild Free-Roaming Horses and Burros Act

A decision to make proportionate reductions in livestock and wild horse use that was based on monitoring, research, and analysis of usage of the public lands and was shown to have been made in consideration of the condition of the affected range in terms of available forage was properly affirmed.

APPEARANCES: Nancy Whitaker, Sacramento, California, for Animal Protection Institute of America; Stewart Wilson, Esq., Elko, Nevada, for intervenor Dollyruth Ansolabehere; James F. Dawson, Esq., Reno, Nevada, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Animal Protection Institute of America (API) has appealed from an October 7, 1993, decision of Administrative Law Judge John R. Rampton, Jr., that affirmed a February 14, 1992, decision of the Shoshone-Eureka Resource Area Manager, Bureau of Land Management (BLM). The BLM decision provided for a proportionate reduction in wild horses and livestock grazing on the Manhattan Mountain allotment in order to achieve an appropriate management level (AML) in conformity to applicable Departmental regulations.

On appeal to this Board, API has repeated arguments previously made to the Administrative Law Judge, contending that the AML established by BLM for horses on the range in question was not shown at hearing to have been based upon monitoring data so as to establish a need for horse removal within the contemplation of the Wild Free-Roaming Horses and Burros Act,

16 U.S.C. § 1333 (1988). See statement of reasons (SOR) at 3-4. Challenging the contrary findings of fact made by the Administrative Law Judge, API argues that there was no evidence of "utilization monitoring data" introduced at hearing, and that it was not shown that the BLM decision was based on "actual monitoring and inventorying data." Id. at 5. Further, an alleged inaccuracy of maps and diagrams of the area at issue that were introduced as exhibits at hearing is cited as indicative of the failure of the record to support the BLM decision. Id. at 7. Relying on an argument that the BLM decision reviewed was contrary to public policy established by the Public Rangelands Improvement Act, 43 U.S.C. § 1901 (1988), API has moved for "summary judgment" and requests that we order a "full programmatic Environmental Impact Statement" and "stay all removals * * * on all roundups bureau-wide in the interim." Id. at 2.

Treating the motion as a request for expedited review, and inasmuch as part of this case was previously before us (it was docketed as IBLA 92-565 before it was referred to hearing on October 14, 1992), and because consideration of the motions raised by API has occasioned review of the record sufficient to permit decision, we advance this appeal on the docket, deny the request that we order a programmatic environmental impact statement and stay all pending removals (removal in this case was stayed automatically and has yet to be accomplished), and affirm the decision from which appeal was taken.

[1] After summarizing the evidence presented by the parties at hearing in a decision which we adopt and attach to our decision as Appendix A, the Administrative Law Judge addressed each of the arguments raised by API in the SOR filed in this appeal. API has not shown any of the findings made by the Administrative Law Judge to be in error, as it must do if it is to prevail on appeal (see generally API, 122 IBLA 290, 295 (1992)) (SOR at 8). Examination of the record, however, supports the findings made by the Administrative Law Judge. We therefore conclude for reasons explained in greater detail in Appendix A, that BLM properly found, based upon monitoring data supported by expert testimony and exhibits produced at hearing, there should be a proportionate reduction of wild horses and livestock in the amounts determined.

The argument by API that this case was similar to that described in API, 124 IBLA 231, 236 (1992), was properly rejected by the Administrative Law Judge because in this case, unlike the one cited, it was affirmatively shown that there was a continuing and systematic study of range and forage conditions made in order to obtain an understanding of the effect on the public lands of the wild horse and livestock populations that were using the area in question. See Appendix A. The record before us establishes that wild horse use in the area at issue contributed significantly to overgrazing, and that the proportionate removal found to be needed by BLM was proper.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

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Appendix A

United States Department of the Interior
Office of Hearings and Appeals
Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138
(Phone: 801-524-5344)

October 7, 1993

ANIMAL PROTECTION INSTITUTE OF AMERICA,	:	IBLA 92-565 and N6-92-2
Appellant	:	Appeal of Area Manager's Final Multiple Use Decision dated February 14, 1992, Shoshone-Eureka Resource Area, Battle Mountain District, Nevada
v.	:	
BUREAU OF LAND MANAGEMENT,	:	
Respondent	:	
DOLLYRUTH ANSOLABEHERE,	:	
Intervenor	:	

DECISION

Appearances: Nancy Whitaker, Sacramento, California, for the appellant;

James F. Dawson, Esq., Bureau of Land Management, Reno, Nevada, for respondent;

Stewart Wilson, Esq., Elko, Nevada, for intervenor.

Before: District Chief
Administrative Law Judge Rampton

Appellant Animal Protection Institute of America (API) has appealed the February 14, 1992, Final Multiple Use Decision (Final Decision) of the Area Manager of the Shoshone-Eureka Resource Area, Bureau of Land Management (BLM). The Final Decision provides for a proportionate reduction in wild horses and livestock using the Manhattan Mountain

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allotment to achieve appropriate management levels (AML's) for the animals, phasing in the livestock reductions over a 5-year period.

The issues for determination are (1) whether the AML for wild horses was established in accordance with applicable law and (2) whether the regulation authorizing the 5-year phase-in period for livestock reductions is valid. For the reasons set forth below, Final Decision must be affirmed as a valid exercise of the Area Manager's authority in conformance with the Taylor Grazing Act, Public Rangelands Improvement Act (PRIA), Federal Land Policy and Management Act (FLPMA), and the Wild Free-Roaming Horses and Burros Act (WFRH&BA).

Statement of the Facts

The Final Decision is the result of a process that began in 1982 with an aerial horse count. The Record of Decision for the Shoshone-Eureka Environmental Statement and Resource Management Plan (Record of Decision) was issued on March 10, 1986, and later amended on November 6, 1987. The Record of Decision, as amended, provided for protecting key forage species, improving ecological conditions, and monitoring livestock use to determine appropriate use levels. The Record of Decision also contained short-term management actions to determine what, if any, adjustments in livestock and wild horse use were needed (Exs. 1, 2).

In December 1988 the Shoshone-Eureka Rangeland Program Summary (RPS) was issued to identify and inform the public of BLM progress in meeting allotment management objectives. The RPS reaffirmed the objectives of monitoring current livestock use levels and using 1982 aerial counts as a starting point for managing wild horses (Ex. 3).

The Management Action Selection Report (MASR) was issued on April 30, 1991. The MASR adopted the recommendation of the Manhattan Mountain allotment evaluation, based upon monitoring data, to reduce grazing use by 45 percent in the allotment, leaving 1,696 AUM's for cattle owned by Intervenor Dolly Ruth Ansolabehere and 1,178 AUM's for wild horse which graze the allotment.

On May 1, 1991 a Proposed Final Multiple Use Decision (Proposed Decision) was issued. The Proposed Decision set forth the means of implementing the MASR. Various parties protested the Proposed Decision and, in response, BLM scheduled a field tour of the allotment. The tour took place on July 13, 1991.

The Final Decision was issued on February 14, 1992. The Final Decision establishes an AML for wild horses of 98 head, which is the equivalent of 1,178 AUM's, in the Manhattan Mountain allotment. The Final Decision also provides for reducing the existing active preference for all livestock permittees of the allotment (2,579 AUM's) by 1,682

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AUM's over a 5-year period. In other words, the Final Decision accomplishes a proportionate reduction in wild horses and livestock using the allotment.

Discussion

The WFRH&BA authorizes and directs the Secretary of the Interior

> to protect and manage wild free-roaming horses and burros as components of the public lands * * * to achieve and maintain a thriving natural ecological balance on the public lands. * * * Where the Secretary determines * * * that an overpopulation exists on a given area of public lands and that action is necessary to remove excess animals, he shall immediately remove excess animals from the range so as to achieve appropriate management levels.

16 U.S.C. § 1333(a), (b)(2) (1985). PRIA states Congress' intent to "continue the policy of protecting free-roaming horses and burros * * * while at the same time facilitating the removal and disposal of excess wild free-roaming horses and burros which pose a threat to themselves and their habitat or other rangeland values." 43 U.S.C. § 1901 (1992).

> In examining [the WFRH&BA the Interior Board of Land Appeals (Board) has] concluded that the statutory term "appropriate management level" (AML) has a very specific meaning in regard to removing wild horses or burros from the public range. "It is synonymous with restoring the range to a thriving natural ecological balance and protecting the range from deterioration." Animal Protection Institute of America, [109 IBLA 112, 118 (1989)]. Thus, the number of "excess" animals the Secretary is authorized to remove is that which exceeds the AML, which is the optimum number of wild horses that "results in a thriving natural ecological balance and avoids a deterioration of the range." 109 IBLA at 119; see 16 U.S.C. § 1332(f) (1982).

Craig C. Downer, 111 IBLA 332, 336 (1989).

The removal of wild horses is unauthorized if the AML "has been established for administrative reasons, rather than in terms of the optimum number which results in a thriving natural ecological balance and avoids a deterioration of the range." Animal Protection Institute of America, 109 IBLA at 119. Furthermore, "a determination that removal of wild horses is warranted must be based on research and analysis and on monitoring programs involving studies of grazing utilization, actual use, and climatic factors." Animal Protection Institute of America, 118 IBLA 20, 21 (1991); see also, Craig C. Downer, 111 IBLA at 336-337.

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API contends that the AML for horses was not based upon monitoring data in contravention of the aforementioned principles of law. API asserts that the AML for horses was the result of bargaining between BLM and livestock interests to maintain existing grazing preference allocations.

BLM maintains that the AML for horses was properly based upon monitoring data, as established by expert testimony and exhibits, including a February 13, 1991 Allotment Evaluation (AE), the Record of Decision, and field notes from the July 13, 1991 site tour. The evidence shows that BLM is correct - that the AML for wild horses was established in accordance with the law.

Shoshone-Eureka Resource Area Manager Wayne King testified that the AML for wild horses is based on the 1982 horse census (Tr. 67-68) and monitoring data (Tr. 72). BLM considered, as required in Animal Protection Institute of America, 118 IBLA at 21, grazing utilization, actual use, climatic factors, horse census figures, range survey data, and consultations with affected interests and specialists in determining that the range was being overutilized, that wild horses were responsible, in part, for the overuse, and that the number of horses should be reduced to the AML figure of 98 head (Tr. 109, 195).

Despite BLM's collection and consideration of the appropriate data, API contends that wild horses are not responsible for the overutilization of the range because they are highly mobile and, therefore, don't graze in particular areas for a long time. Contrary to API's contention, the evidence shows that wild horses contribute significantly to overutilization of the range.

Throughout the hearing, Mr. King and BLM Wild Horse Specialists Roger Bryan and Valerie Dobrich repeatedly noted that horses use the areas being overgrazed (Tr. at 55, 82, 109-111, 128, 130-131, 134, 136, 142, 158, 161, 172-175, 194-195, 198). Ms. Dobrich testified that the use pattern, census, and seasonal distribution maps from 1982 through 1992 show a sizable number of horses utilizing the portions of the Manhattan Mountain allotment which, according to range monitoring data, have been heavily used and overgrazed (Tr. 136). Dobrich stated that the seasonal distribution map for January 1993 show horses more widely distributed than the previous maps show, but attributed the change to heavy snowfall (Tr. 163).

The overutilization has been occurring around the water sources which the horses frequent (Tr. 72, 148, 150, 166-168, 196). Ms. Dobrich indicated that horses are territorial in their use of water sources, repeatedly returning to the same water sources (Tr. 158, 198). Because bands of horses continually move in and out of the same limited number of water source areas, there are horses in overutilized areas on a nearly constant basis (Tr. 198). Thus, Mr. King and Ms. Dobrick [sic] reasonably concluded, despite the horses' mobility, that they significantly contributed to the overgrazing of the heavily used areas (Tr. 109-110, 194-195, Exs. A-8, BLM-1).

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API contends that even if wild horses are responsible, in part, for the overutilization of the range, proration is not the appropriate method for allocating the available forage. API asserts that the law requires BLM to identify a specific number of horses to be removed. The Board has declared, however, that it is proper to include wild horses in a proportionate reduction of grazing use levels where, as here, wild horses have contributed significantly to the overgrazing. Animal Protection Institute of America, 124 IBLA 231, 236 (1992).

In this case, Mr. King and his staff reasonably determined that both wild horse use and livestock use needed to be reduced in order to achieve a thriving, natural ecological balance (Tr. 73, 110-111, 194-196). The Board has held that it will not substitute its judgement for that of BLM's experts and managers regarding the allocation of grazing reductions among livestock and wild horses so long as the horses are found to be excess. Animal Protection Institute of America, 122 IBLA 290, 294 (1992).

> [I]n cases involving expert interpretation of data, it is not enough that a party objecting to the interpretation of data demonstrates another course of action is available. * * * The appellant must demonstrate by a preponderance of the evidence that the BLM expert erred when collecting the data, when interpreting the data, or in reaching the conclusion.

Id. at 295. API has not met this burden of proof with regard to the AML for wild horses.

Finally, API challenges BLM's decision to phase in the livestock reductions over five years. In compliance with 43 CFR 4110.3-3(a), the Final Decision requires a 5-year phase-in period for the livestock reductions because the change in active preference is in excess of 10 percent. API argues that this regulation violates the full force and effect requirement of FLPMA, presumably referring to 43 U.S.C. § 1752(e) (1985). This office has no authority to declare invalid a duly promulgated regulation of the Department. See Kuugpik Corp., 85 IBLA 366 (1985). Such regulations have the force and effect of law and are binding on the Department. Id.

API also contends that the regulation is unconstitutional because authorization for the regulation derives, in part, from certain appropriation acts and because changing statutory law in an appropriations act violates constitutional law. API's contention cannot be sustained because "the Office of Hearings and Appeals is not the proper forum to decide constitutional questions. Christopher C. Sloane v. Office of Surface Reclamation and Enforcement, 114 IBLA 353, 358 (1990); see also 43 CFR 4.1 (1992).

Conclusion

Without further belaboring this decision with additional references to contentions regarding errors of fact and law, except to the extent they have been expressly or impliedly addressed in this decision, they are rejected on the ground they are, in whole or in part, contrary to

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the facts and law or are immaterial. Based upon the foregoing, the Final Decision must be, and is hereby, affirmed as a valid exercise of the Area Manager's discretion in compliance with the law.

John R. Rampton
District Chief
Administrative Law Judge